Supreme Court, U. S.
FILED
DEC 23 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1589

No. 74-1590

GENERAL ELECTRIC COMPANY,

Petitioner in No. 74-1589
Respondent in No. 74-1590,

—v.—

MARTHA GILBERT, INTERNATIONAL UNION OF ELECTRIC RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,

Respondents in No. 74-1589
Petitioners in No. 74-1590.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF WOMEN'S LAW PROJECT AND AMERICAN CIVIL LIBERTIES UNION

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INTEREST OF AMICI

WOMEN'S LAW PROJECT

The Women's Law Project is a tax-exempt, non-profit corporation organized under the Pennsylvania Nonprofit Corporation Act and dedicated to working for the legal equality of women through litigation, public education, research and the representation of local women's organizations. The Project is particularly concerned with the the theory and implementation of the equal rights amendment, and is currently preparing a major report on state law conformance to the amendment's principles.

Two attorneys at the Project were co-authors with Professor Thomas I. Emerson and Gail Falk of the Yale Law Journal article, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale Law Journal 871 (1971), which was distributed to all members of Congress before the final debates on the equal rights amendment and was made part of the legislative history of the amendment by its proponents. Since its inception, one of the major components of the Project's work has been research, writing, and the provision of technical assistance concerning the theory of the amendment.

The Project has engaged in litigation under Title VII of the Civil Rights Act of 1964 concerning the right of women employed

by the City of Philadelphia to use sick leave for maternity-related disabilities and is therefore familiar with the issues raised by this case. The Project is particularly concerned with the part which discrimination against women based on their childbearing capacities has played in keeping them in a subordinate position in the labor market and society as a whole. In this brief, amicus draws upon its expertise in the theory of the equal rights amendment and in the policies at issue here to present to the Court an argument that the legislative history of the ERA supports, rather than negates, the conclusion that Title VII prohibits the exclusion of pregnancy-related disabilities from the General Electric disability income protection plan.

AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that confinement of women's opportunities is a pervasive problem at all levels of society, public and private, the American Civil Liberties Union has established a Women's Rights Project to work towards the elimination of gender-based discrimination. The American Civil Liberties Union believes that this case, concerning the rights of work force members disabled due to pregnancy, poses an issue of great

significance to the achievement of full equality between the sexes.

Lawyers for the American Civil Liberties Union have participated in a number of cases involving government and employer rules subjecting women who bear children to disadvantageous treatment. We appeared as amicus curiae in Cohen v. Chesterfield County School Board and Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), which declared inconsistent with due process forced termination of a teacher's employment at a fixed stage of pregnancy, and Geduldig v. Aiello, 417 U.S. 484 (1974), which upheld, against an equal protection challenge, the exclusion of women disabled by childbirth from a state-operated social insurance program. Lawyers for the American Civil Liberties Union were counsel for the Petitioner in Struck v. Secretary of Defense, 461 F.2d 1372 (9th Cir. 1971, 1972), cert. granted, 409 U.S. 947, judgment vacated and case remanded for consideration of mootness, 409 U.S. 1071 (1972), which challenged the Air Force discharge of Captain Struck for pregnancy, and for the Petitioner in Turner v. Department of Employment Security, 44 U.S.L.W. 3298 (U.S.S.C. Nov. 17, 1975), which struck down Utah's arbitrary exclusion of childbearing women from unemployment compensation.

With regard to gender-based discrimination generally, lawyers for the American Civil Liberties Union presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), participated as counsel for the appellants and later as amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351

(1974), and the appellees in Edwards v. Healy, 421 U.S. 772 (1975), and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

Letters of consent to file the within brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

General Electric Company and amici in support of General Electric [hereafter, GE] argue that the legislative history of the equal rights amendment supports the proposition that Title VII permits GE to penalize women employees disabled by pregnancy and childbirth by denying them disability insurance benefits available to employees for virtually all other disabilities. To put forward this argument, GE and its amici make use of selected portions of legislative history, quote those portions out of context and thus distort the meaning of that history. In fact, congressional consideration of the equal rights amendment centered on that body's grave concern for the deplorable treatment of women in the labor market and its recognition of the importance of not penalizing women, in or out of the paid labor force, for bearing children. In line with the central tenet of the ERA -- that legal support for sex discrimination is to be eradicated root and branch -- Congress clearly intended the amendment to end all categorical discrimination by law, including the improper use of pregnancy-based classification, which relegates women to an inferior position in

the labor market.

Legislative history reflects the congressional intention that there be a two-tiered standard of judicial review under the ERA: (1) explicit gender classifications are per se outlawed; (2) classifications purporting to deal with a "unique physical characteristic" of one sex are subject to strict scrutiny. Some pregnancy classifications would survive this review. Others, the one at issue here for example, would not.

The legislative history of the ERA, therefore, to the extent it illuminates the meaning of the anti-discrimination guarantee of Title VII, fully supports the conclusion that GE's policy of excluding pregnancy-related disabilities from its plan is illegal.

ARGUMENT

I. The Purpose Of The ERA Is Remedial. Congress Intended To Outlaw Policies and Practices That Injure Women, Especially In Employment, and Disavowed Any Intention To Disadvantage Working Women As Childbearers.

The equal rights amendment was first introduced in 1923, but received only sporadic attention until both Houses of Congress took it under consideration in the early 1970's. In response to a growing awareness of the extent of sex discrimination in our

laws and institutions and to the demand by women that a commitment to sex equality be included in our fundamental instrument of government, Congress held hearings and engaged in debate devoted exclusively to the amendment. On March 22, 1972, the amendment received final congressional approval and was sent to the states for their consideration.

In its deliberations, Congress acknowledged that women suffered discrimination in many and varied forms and that the purpose of the ERA was to improve the situation of women and to eliminate all differential treatment based on gender from our legal system. These points are made forcefully and repeatedly throughout the legislative history of the amendment, particularly in floor debates preceding final passage in the House of Representatives and the Senate:

> All of these various forms of discrimination undermine the confidence of many Americans in our institutions and have an adverse effect on our national morale. Even if these injustices injured only a small number of our female citizens, they constitute wrongs that ought not to go unremedied. The tragic fact is that such discrimination prevents many millions of women from realizing their true capacity to lead full and creative

> lives. Rep. Edwards (Oct. 6, 1971).[1]

> Even among the resolution's opponents, there seems to be little question but that tradition and law have worked together to relegate women to an inferior status in our society. In many cases this has been intentional, based on an archaic precept that women, for physiological or functional reasons, are inferior. Sen. Percy (March 22, 1972).[2]

Members of Congress saw constitutional amendment as the most effective method of reaching the multifarious shapes and guises in which sex discrimination is displayed in our society:

> I firmly believe that the Constitution of the United States should be amended only when a matter of broad and fundamental principle is at stake. The matter we are considering today - the extension to women of equal

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[1] 117 Cong. Rec. 35306.

[2] 118 Cong. Rec. 9595. See also Remarks of Sen. Hartke, 118 Cong. Rec. 9551 (March 22, 1972).

rights under the law - is such a principle.

Discrimination against women is deeply entrenched in the United States and flourishes in both our social and legal spheres, a fact which many opponents of the equal rights amendment acknowledge when they argue that its passage would cause fundamental changes in our national life and institutions. History has shown us that any system which confers benefits or imposes obligations on the basis of such things as race, creed, color or sex inevitably is repressive. Those who wield the greater influence in formulating the law have invariably found it hard to resist enhancing their position at the expense of others. The need for a constitutional amendment to change this pattern by requiring a broad national commitment to the ideal of equality between the sexes under the law is evident. Rep. Ashley (Oct. 12, 1971).[3]

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[3] 117 Cong. Rec. 35089.

Congress intended that the amendment state an encompassing and, in most spheres, an absolute principle, expressive of that body's fundamental commitment to the elimination of the inferior status of women in the nation's economic, political and social life:

> There is but one principle involved, although, as is clear from the discussions, the ramifications are many and varied.
>
> The principle is that sex, by and of itself, cannot be used as a classification to deny or abridge any person of his or her equal rights under the law. This, of course, is more than a mere negative statement that henceforth there can be no legally sanctioned discrimination against women. The amendment should accomplish that but it will do more. It will tell the Federal Government and the governments of the several states that in all their laws they must set up reasonable distinctions and qualifications based not on the overbroad categorization of sex, but rather on the characteristics of individuals. Sen.

Stevenson (March 22, 1972).[4]

No area of the law is exempt; no defenses for an explicit gender-based classification are provided; no exceptions to the scope or dimensions of equality are permitted. The amendment was an answer to a problem of extraordinary magnitude and was intended to reach as far as necessary to solve it:

> I strongly believe that equality is a concept which cannot be diluted. Once even the slightest of qualifications is attached the word becomes meaningless and the system of democracy founded on this principle is therewith diminished. Rep. Koch (Oct. 12, 1971).[5]

One of Congress' prime concerns was discrimination against women in the work force. Congressman Drinan, for example, said:

> Of all the appeals to their country's conscience being issued by American women,

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[4] 118 Cong. Rec. 9547. See also Remarks of Sen. Cook, 118 Cong. Rec. 9576 (March 22, 1972); Remarks of Sen. Kennedy, 118 Cong. Rec. 9371 (March 21, 1972).

[5] 117 Cong. Rec. 38506-07.

> perhaps the most powerful is that women must have equal rights in employment. 117 Cong. Rec. 35797, (Oct. 12, 1971).[6]

Among the aspects of discrimination against working women upon which Congress focused attention was penalization of childbearing. It was acknowledged that such discrimination had no place in the bias-free system Congress envisioned. As Representative Reid stated:

> An abiding concern for home and children should not restrict the freedom of women to choose the role in society to which their interest, education and training entitle and qualify them. 117 Cong. Rec. 35325 (Oct. 6, 1972).

And Representative Abzug noted:

> These benefits [of protective laws] are ridiculously slight -- some states require that women unlike

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[6] See also Remarks of Rep. Hogan, 117 Cong. Rec. 35793 (Oct. 12, 1971); Remarks of Rep. Broyhill, 117 Cong. Rec. 35802 (Oct. 12, 1971); Remarks of Senators Gurney, Hartke, Brooke and Stevenson, 118 Cong. Rec. 9336 (March 21, 1972), 9547, 9548, 9551 (March 22, 1972).

men be given chairs for rest periods but I want any member to show me what states provide a guarantee of security for maternity leave so that women will have jobs to return to after giving birth. 117 Cong. Rec. 35789 (Oct. 12, 1971).[7]

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[7] Similarly, Congress realized that gender-based discrimination in public schools encompassed harsh treatment of pregnant students. Representative Griffiths, the primary sponsor of the ERA in the House, said:

> At least one Federal district court has found unconstitutional the practice of excluding girls from public school solely because they are unwed mothers . . . . In order to become capable of supporting herself and her child, an unwed mother vitally needs an education -- it is cruel to bar her, permanently or temporarily from public high school . . . . [H]ow many courts must consider this issue before it is resolved across the country? This is a clear example of sex discrimination, which would be corrected by the equal rights amendment.

[Footnote continued on next page.]

It is in light of this unqualified legislative commitment to eradicating sex discrimination in all of its forms and to improving the position of women in the labor market that the question of pregnancy-related discrimination must be considered.

II. Under the ERA, Classifications Purporting to Deal With Unique Physical Characteristics Of One Sex Are Subject To Strict Scrutiny.

The legislative history of the ERA includes several examples of pregnancy classifications permissible under the amendment. Among these are "a law providing for payment of the medical costs of childbearing,"[8] and "laws establishing medical leave for childbearing."[9] These pregnancy classifications are valid not because (as suggested by GE[10])

Hearings on H.J. Res. 35208 and Related Bills and H.R. 916 and Related Bills before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92d Cong., 1st Sess. 38 (1971) (hereafter cited as ERA House Hearings).

[8] Separate Views on H.J. Res. 208, H.R. Rep. No. 92-359, 92d Cong., 1st Sess. 7 (1971).

[9] Testimony of Prof. Emerson, ERA House Hearings at 402.

[10] Brief for GE at 41.

pregnancy classification is outside the scope of the ERA, but because the test applicable under the ERA is satisfied.

As noted in the previous section, the ERA broadly proscribes classifications based on gender as such. For classification purporting to deal with "unique physical characteristics" of one sex,[11] however, legislative history demonstrates that strict scrutiny must be the review standard applied, to insure that the basic premise of the amendment is not undermined.

The most detailed explication of strict scrutiny under the ERA appears in a Yale Law Journal article by Professor Thomas I. Emerson and three co-authors, which was distributed to all members of Congress and made part of the legislative history by the proponents of the amendment.[12] The abbrevi-

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[11] Those physical characteristics unique to one sex and thus possessed by all or most women and no men or by all or most men and no women.

[12] Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871 (1971) (hereafter referred to as "Emerson article"). The Emerson article was distributed to all members of Congress by the ERA's chief proponent in the House, Rep. Martha [Footnote continued on next page.]

ated comments made on the floor of Congress and in response to questions during the hearings, quoted in part by GE and its amici, are firmly grounded in the Yale Law Journal discussion, and must be read with its more finely textured arguments in mind.

The Emerson article indicates that in reviewing classification based upon a unique physical characteristic, a court would pursue inquiries indicated by established precedent regarding strict scrutiny in constitutional adjudication. 80 Yale L. J. at 894-896. The six step analysis set forth in the article may be summarized as follows:

Griffiths, several weeks before the final vote in the House, and five months before the final vote in the Senate. In an accompanying letter, Rep. Griffiths described the article to her colleagues as a "detailed analysis of the scope and effects of the ERA" which will "help you understand the purpose and effects of the ERA, which is to do away with the sex discriminations that now so grievously disfigure American law." Letter from Martha Griffiths, Member of Congress to her colleagues, Sept. 20, 1971. Senator Birch Bayh introduced the article into the Congressional Record on Oct. 5, 1971. 117 Cong. Rec. 35012. It was referred to extensively in the debates which preceded final passage of the ERA by Congress, and was termed "primary legislative history" of the amendment. 118 Cong. Rec. 9097 (1972).

(1) Is the unique feature of the characteristic relevant to the purpose of the classification?

(2) Is there a compelling state interest in legislating on this particular subject in this manner?

In attempting to show that its pregnancy classification would survive scrutiny under the ERA, GE has totally ignored the thrust of the first inquiry. For as the Emerson article points out, unless the principle permitting classification based on unique physical characteristics is

> strictly limited to situations where the regulation is closely, directly and narrowly confined to the unique physical characteristic, it could be used to justify laws that in overall effect seriously discriminate against one sex.

80 Yale L.J. at 894.

Under the first of the two tests stated above, the properties of the characteristic in question must be examined. The condition of pregnancy, for example, possesses a number of properties, some of them shared with other conditions (need for medi-

cal care, period of disability[13]), and some, wholly unique (the birth of a child is a usual result). The uterus, too, shares some characteristics with other organs (subject to disease and malfunction), and has some features wholly unique to it (the reproductive function). The first test is met only where the purpose of a classification based upon pregnancy, the uterus or some other unique physical characteristic is related to the unique properties of that characteristic.

To illustrate the essential point missed by GE. A temporary disability program excludes from coverage disabilities associated with uterine cancer, but covers other forms of cancer, including cancer of the prostate gland. The classification is based on a unique physical characteristic of women. However, it is unrelated to the

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[13] Dr. Bernice Sandler, testifying on behalf of the Women's Equity Action League during the House hearings, stated in a colloquoy with Representative Wiggins:

> Insofar as pregnancy is a disabling condition and one goes to the hospital and one may die from it, it is a disability and you might very well cover it with the same rules that cover disability.

ERA House Hearings at 284.

unique feature of the uterus -- its reproductive function. Nothing about this form of cancer differs from any other cancer for the purpose at hand -- replacing income lost through disability. Perhaps coverage of uterine cancer is expensive, but even if it is, this too is a feature uterine cancer shares with many other conditions which are experienced by both males and females. Thus, an exclusion on the basis of cost would also fail to satisfy the close nexus demanded by the test. Yet under GE's superficial analysis, the exclusion, in fact, a broader exclusion covering every disease or disability associated with female reproductive organs, would pass muster under the ERA. Congress could not possibly have intended to permit a loophole so large, so easily invoked, and so destructive of the grand and encompassing purpose of the amendment.

Statements in ERA legislative history, quoted by GE and its amici, to show that unique physical characteristic classification is permissible under the ERA, in fact reflect approval only of those classifications which would meet the first test, for example, "a law providing for payment of the medical costs of childbearing," and "laws establishing medical leave for childbearing." See Brief for GE at 39-40; Brief for amicus curiae for Westinghouse at 23. In the situations to which the ERA proponents referred, the classification is based not only on a unique physical characteristic (the uterus, for example), but the unique

function or feature of that characteristic is relevant to the purpose of the classification. Thus, the illustrative remarks approve pregnancy classifications which, because they relate precisely and exclusively to the reproductive function, clearly satisfy the first test.

The classifications approved in the remarks quoted by GE and its amici also satisfy the second test in that the legislation described, focused closely, directly and narrowly on maternal and infant health, serves vital public purposes. See, e.g., Roe v. Wade, 410 U.S. 113, 163 (1973) (compelling governmental interest in health of viable fetus as well as health of childbearing woman); Stanley v. Illinois, 405 U.S. 645, 652 (1972) (welfare of minor children as an overriding public concern).

If GE were a state employer subject to the ERA, its treatment of disabilities related to pregnancy and childbirth would not survive the scrutiny appropriate under the amendment. First, the necessary nexus between the classification and the unique feature of pregnancy is not present. In the context of employment, disabilities related to pregnancy and childbearing are not different from other temporary disabilities. Both involve temporary inability to work and medical expenses. These are the factors relevant in the work place. They exist to the same extent whether the disabling con-

dition is childbirth or a broken leg.[14]

Furthermore, no compelling interest justifies a pregnancy classification in this context. The state as an employer has no interest in maternal health and child health distinct from its interest in the health and well being of all employees. Thus, qua employer, the state would not be justified in treating disabilities related to pregnancy or childbirth differently from other disabilities.

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[14] GE's misconception is illustrated graphically by one of the justifications it offers for its pregnancy classification -- disabilities related to pregnancy and childbirth are excluded to insure against further imbalance between males as a group and females as a group with regard to receipt of total benefits under the plan. Brief for GE at 23, 57-59. This justification demonstrates that the uniqueness of pregnancy and childbirth has nothing to do with GE's categorical exclusion. Instead, the disability experience of individual women is attributed to women employees as a group. Such sex averaging is precisely the kind of practice that Congress intended to stop when it passed the ERA. Remarks of Sen. Stevenson, 118 Cong. Rec. 9547 (March 22, 1971).

CONCLUSION

A contextual approach to the legislative history of the ERA reveals the superficiality of the quotation search made by GE and its amici. More careful attention to congressional purpose discloses that some pregnancy classifications were indeed intended to survive the ERA, those that deal with the special function served by pregnancy and do so to effect directly and preciselv an overriding public interest. Such advercence also discloses that pregnancy classifications of the kind here at issue would not survive the ERA. Thus, the legislative history of the ERA, to the extent it sheds any light upon the issues presented by this case, supports the position of Martha Gilbert and IUE.

Respectfully submitted,

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December, 1975